

LABOR AND EMPLOYMENT LAWNOTES

Volume 9, No. 3

Fall 1999

STICKS AND STONES MAY BREAK YOUR BONES, BUT THAT MAY NOT CONSTITUTE A “DISABILITY”

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A trilogy of widely anticipated decisions from the United States Supreme Court has resolved an important issue which had caused major disagreement among the Federal Courts of Appeal. The cases hold that, when considering whether an individual has a “disability” — that is, a “physical or mental impairment that substantially limits one or more of the major life activities of such individual” — the condition must be considered in light of any medication which is used or mitigating factors which are present. The decisions, issued on June 22, should have the effect of reducing the number of individuals who are protected by the Americans With Disabilities Act (“ADA”), 42 U.S.C. §12101 et seq.

The cases are *Sutton v United Air Lines, Inc.*; *Murphy v United Parcel Service, Inc.*; and *Albertsons, Inc. v Kirkingburg*. *Sutton* involved identical twin sisters applying to be airline pilots, who had uncorrected vision of 20/200 or worse, but corrected vision with glasses of at least 20/20. *Murphy* involved a mechanic with unmedicated blood pressure of 250/160, but which — with medication — did not significantly restrict any of his daily activities. *Kirkingburg* involved a truck driver with amblyopia, a condition that effectively resulted in “monocular” vision.

The ADA provides that a “disability” is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”; or “a record of such an impairment”; or “being regarded as having such an impairment.” 42 U.S.C. § 12102(2)(A-C, respectively). However, the statute is silent as to whether, in determining if the condition “substantially limits” a “major life activity” the condition is considered in a medicated or unmedicated state. Many clearly serious conditions can be entirely or substantially controlled with medication, or effectively mitigated with the use of a prosthetic device or adaptive aid. Thus, a condition that is viewed in its unmedicated state may well meet the requirement of substantially limiting a major life activity, while considering that same condition in its medicated or mitigated state would result in the opposite conclusion. A majority of the Federal Courts of Appeal which had considered the issue had concluded that it was the condition in its unmedicated or unmitigated state which was determinative.¹ Similarly, the Equal Employment Opportunity Commission (“EEOC”), the agency responsible for investigating ADA charges, had issued guidelines which also stated that for ADA purposes a condition should be judged in its unmedicated or unmitigated state.²

The Supreme Court held that because the language of the Act itself requires that a condition, to constitute a protected “disability”, must substantially limit a major life activity, the person must be presently, “not potentially or hypothetically,” substantially limited. (*Sutton*, opinion, page 5 of 17). Thus, the Court concluded:

A “disability” exists only where an impairment “substantially limits” a major life activity, not where it “might,” “could,” or “would” be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity. *Id.*

Accordingly, the Court found that the plaintiffs’ severe myopia in *Sutton*, because completely corrected with glasses, was not a protected “disability.” Similarly, Murphy’s blood pressure, substantially corrected with medication, failed to constitute a protected condition.

SCOPE OF ADA PROTECTION NARROWED

There is no doubt that the Supreme Court has significantly narrowed the scope of the ADA and limited the number of individuals who will have conditions which constitute “disabilities.” In fact, numbers played a significant role in the Court’s determination. The Court found it “critical” that findings enacted as part of the ADA, pegged the number of Americans who have conditions which constitute physical or mental disabilities at 43 million.

Significant discussion was devoted to this number and its source. However, the Court concluded that regardless of the exact source of that number, it was more consistent with a finding that those whose impairments are largely corrected by medication or other devices or adaptive aids are not “disabled” as defined by the Act. In fact, during oral argument it was suggested that if all those who, for example, required glasses were deemed to be within the Act’s protection, a majority of all Americans would be considered “disabled,” a result thought inconsistent with the purpose of the ADA.³

WHO IS “DISABLED”?

The Court made clear that “whether a person has a disability under the ADA is an individualized inquiry.” Its rejection of the EEOC guidelines was based on the fact that under those guidelines courts and employers would, in considering individuals taking medication or using an adaptive aid, be forced to make disability determinations based on generalized or stereotypical conclusions about how uncorrected impairments usually affect individuals. The Court rejected an approach which would require persons to be treated as members of a group of people with similar impairments, rather than as individuals.

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STATEMENT OF EDITORIAL POLICY

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STICKS AND STONES MAY BREAK YOUR BONES

(Continued from page 1)

In light of these cases, it will be very difficult to say, in the abstract, whether any given condition, no matter its seriousness or long term prognosis, constitutes a "disability."⁴ Rather, employers must consider each situation as unique, and consider whether the person in question is currently substantially limited in any major life activity. Moreover, in making that determination, not only must the affects of medication or adaptive aids or devices be considered, but the body's own ability to adapt to and compensate for impairments must also be considered. "We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems." (*Kirkingburg*, opinion, page 4 of 11).

Employers are permitted to establish physical or mental standards, and to "prefer some physical attributes over others." An employer may, for example, decide that one's build, ability to see or sing are preferable to others. An employer runs afoul of the ADA when it sets standards or criteria based on impairments, whether real or imagined, which are regarded as substantially limiting a major life activity. If an employer determines that impairments which are limiting, but not substantially limiting, make some individuals less suitable than others, it does not violate the ADA.

The requirement of an individualized assessment, and the relatively few conditions which may constitute *per se* "disabilities," is likely to make it more difficult to maintain class action suits. The necessary elements of a class action will be difficult to prove. By its very nature a class action requires the argument that people should be treated as members of a fairly homogeneous class or group, rather than as individuals each of whom responds differently to the condition and to medication or treatment. Such an argument runs directly counter to the Court's reasoning.

Accommodations under the ADA must be made on an individualized basis. In determining what accommodation is needed and whether it is "reasonable," employers and employees are required to undergo an "interactive process." Since it is now clear that the threshold issue of whether an individual has a protected "disability" must be made on an individualized basis, it will also likely develop into a more interactive process. Employers cannot safely rely merely on the name of a condition or on its general symptomatology in deciding whether one is protected under the Act. Rather, that determination will require substantial information, from the employee and/or medical providers or experts, as to the functional capacity and actual limitations resulting from the condition.

The Michigan Supreme Court previously considered and resolved this issue under State law in *Chimielewski v Xermac*, 457 Mich 593 (1998). That case held that under Michigan's Persons With Disabilities Civil Rights Act, formerly known as the Handicappers Civil Rights Act, MCLA 37.1101 *et seq.*, determinations as to whether one is disabled must also be made by considering the medicated or mitigated state. Since the holdings by the Michigan and United States Supreme Courts are consistent, and the definitions of the ADA and PWDCRA are also consistent, the analysis for employers under both State and Federal should be the same.

ISSUES STILL UNRESOLVED

While the Supreme Court has conclusively decided the medicated/unmedicated issue, several other important issues remain undecided. In *Sutton* and *Murphy*, as in *Chimielewski* before them, the plaintiffs were taking medication or using adaptive aids. That is, their current state was the medicated/mitigated state. Many easily remedied or commonplace conditions are excluded from protection when the current state of the condition is the medicated state, a result which appears consistent with the intent of the Act. However, in a situation in which an individual has an easily remedied condition but the current state is unmedicated or unmitigated, the intended result is less obvious. Neither the Michigan nor the United States Supreme Courts addressed that situation. However, the language used by both Courts seems to indicate that it is the current, actual state of the individual, whether medicated or not, which controls. The emphasis on individualized determinations, and the Court's rejection of considering a potential or hypothetical condition or making determinations based on stereotypical assumptions all indicate consideration only of the current condition. Indeed, the EEOC, for precisely these reasons, has already indicated that its position is that an unmedicated individual with a currently limiting condition is "disabled," regardless of whether medication or adoptive aids might eliminate the limitation.⁵ While this position is logically consistent with the Court's reasoning, these decisions demonstrate that the Court may not be particularly deferential to the EEOC positions or guidelines.

Consideration of an impairment only in its current state, ignoring the issue of whether such a condition could be easily controlled or mitigated, might be consistent with the language of the Court's decisions, but appears to conflict with the general goals of anti-discrimination statutes in general. Consideration only of the current state will result in situations in which individuals with easily controllable or correctable conditions, who are unable or refuse to take advantage of those options, are protected by the Act. Should the Act protect individuals with easily remedied conditions? When an individual refuses to accept an easy remedy, and the refusal to remedy the condition is for vain or foolish reasons — for example refusing to wear a hearing aid because the individual does not want to "look old" — the issue may appear clear. From a policy standpoint it is logical that individuals who make efforts to help themselves by treating or controlling their conditions, but who nonetheless are still substantially limited by the condition, or by the medication or adaptive aid itself, should fall within the Act's protection. It is less obvious that the Act should, or was intended to, protect individuals with impairments which would result in no functional limitation, if reasonable measures were taken.

Moreover, failing to consider how medication or adaptive aids might control a condition runs counter to another generally accepted purpose of the anti-discrimination statutes. Such statutes typically intend to protect against discrimination based on immutable, and irrelevant, characteristics. A consideration of only the current state of a condition allows at least some individuals themselves to control whether they meet the Act's definition of "disability," and could result in an anomalous situation. Two identical individuals with identical controllable conditions could be treated differently under the law. If one of the individuals takes medication, thereby fully mitigating the condition, that individual would not be "disabled" and an employer could refuse to hire her because of that condition. The other identical individual, who does not take the medication, would be protected under the Act.

If courts begin excluding from ADA protection conditions which are limiting but easily remedied, they may find themselves on a slippery slope. Expecting an individual to wear glasses may not seem overly intrusive or unreasonable, but should an individual be expected to take medication which may well control a condition but which has significant side effects? Should an individual be required to undergo surgery which has a very high likelihood of fully controlling or curing the condition but which has some statistically significant risk of very serious problems or mortality?

There are other important issues not addressed by these decisions. One is whether individuals who do not meet the general definition of having a "disability", but who are protected because they fall under the alternative definitions of having a "history of" such a condition or are "regarded as" having such a condition, are entitled to a reasonable accommodation. On the one hand it seems illogical that an individual without any current substantial limitation of a major life activity should require or be entitled to any accommodation. On the other hand, if an employer regards such an individual as having a protected condition, should not that individual then have access to reasonable accommodations such as a break in order to take his or her medication? Another unresolved issue is whether "work" constitutes a "major life activity." The *Sutton* Court expressed some doubt, but did not directly decide the issue. These issues will certainly be the basis for future decisions.

— END NOTES —

⁵See, e.g., *Arnold v United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir 1998); *Bartlett v New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir 1998); *Matzak v Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3rd Cir 1997); *Baert v Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir 1998); *Doane v City of Omaha*, 115 F.3d 624 (8th Cir 1997); *Holihan v Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir 1997); *Harris v H & W Contracting Co.*, 109 F.3d 773 (11th Cir 1997).
²⁹29 CFR 1630.

³Comment by Justice Scalia during April 27, 1999 oral argument.

⁴The *Kirkingburg* Court did indicate that some impairments may "invariably" cause a substantial limitation of a major life activity. Although not specifically identifying such impairments, conditions such as total blindness or deafness, or conditions which make one wheelchair bound, may constitute *per se* "disabilities." While the *Kirkingburg* Court declined to find that monocular vision was a *per se* disability, it did conclude that such condition would "ordinarily" meet the Act's definition of disability. HIV positive status may constitute a *per se* "disability," although the Supreme Court did not reach that specific issue in *Bragdon v Abbott*, 524 U.S. 624 (1998).

⁵Comments by Peggy Mastroianni, Associate Legal Counsel, EEOC, Washington, DC, during a July 29 ABA/CLE sponsored seminar on "The Americans With Disabilities Act and Employment After the Supreme Court's 1999 Decisions." ■



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BREAKING THE SEVENTH COMMANDMENT

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Generations of law students remember the late Irving Younger, judge, law professor, and lawyer, for his Ten Commandments of Cross-Examination. Younger's Commandments were just what law students look for and rarely find: understandable, simple and practical rules. Younger's Commandments seemed a universe away from evidence class, which was obscure and had little discernable connection to the courtroom. In addition, unlike evidence class, Younger was fun.

At first, Younger's Commandments seem to be the gateway to perfect understanding. As neophytes become experienced lawyers, however, they learn that Younger's simple rules are sometimes complicated in the application, and that sometimes the rules are made to be broken.

Of course, it is nice to see your opponent violate the Commandments, wrecking his case and making yours. On the other hand, it is painful, in the there-but-for-the-grace-of-God-go-I sense, to watch another lawyer self-destruct. Years ago I had such ambivalent feelings when I witnessed my opponent break Younger's Seventh Commandment in a really ugly way.

It was in a criminal case, a misdemeanor prosecution arising out of a strike. My clients were charged with trespass for leafletting on property adjacent to the employer's facility. Among the numerous grounds for my dismissal motion was selective prosecution.

A replacement worker crossed the picket line. Picketers greeted her with vocal disapprobation, in terms unsuitable for repetition in this dignified publication. Across the picket line, halfway to the employer's building, the replacement expressed her own dissatisfaction in a memorable way. She stopped, turned back toward the picket line, reached into her purse and removed a handgun. She slowly rotated, pointing the gun barrel along the picket line. The picketers hit the asphalt.

The employer's security guards persuaded the woman to re-purse her weapon and escorted her into the building. A little later, the police came and took her away, amidst the strikers' cheers.

The woman was never charged with a crime. As you can imagine, this did not sit well with strikers, particularly those charged with trespass. We moved to dismiss the trespass charges arguing there is something wrong, and unconstitutional, when one side in a strike faces prosecutions for leafletting while the other side's felonious assaults are ignored.

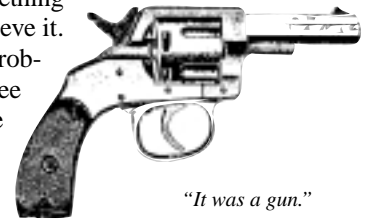
We had an evidentiary hearing. I called a striker who testified that the replacement worker pointed her gun at him and others on the picket line. He testified that he feared for his well-being and dropped to the ground behind a parked car. I thought his testimony went in well: clear, succinct and persuasive. I hadn't violated any direct examination commandments.

The prosecutor stood to cross-examine. She immediately broke Younger's Seventh Commandment: "never allow the witness to repeat on cross-examination what he said on direct examination." She did it in such a pure way it remains a perfect bad example. The following account is poetically true if not verbatim.

- Q. Mr. Smith, you testified on direct that Ms. Jones pointed a gun at you?
- A. Yes.
- Q. How far away from her were you when you say she pointed this gun?
- A. About 15 or 20 feet.
- Q. And you say she reached in her purse, pulled out a gun, and pointed it at you?
- A. Yes.
- Q. Now, Mr. Smith, are you sure it was a gun?
- A. I'm sure.
- Q. Mr. Smith, might it have been something else? You were 15 or 20 feet away.
- A. No, it was a gun.
- Q. Mr. Smith, are you absolutely sure it was a gun?
- A. I am absolutely sure it was a gun.
- Q. Couldn't it have been some object from her purse, like a metal compact or something like that? Isn't it true that you really cannot be absolutely sure she had a gun?
- A. Look, I am absolutely sure it was a gun. It was a little automatic, chrome, maybe a .25 caliber. I saw it very clearly. She pointed it at me. I looked down the hole in the barrel of that gun. It scared the hell out of me. I dropped to the ground behind a parked car. I was afraid she was going to shoot me. She had a gun. I am absolutely sure it was a gun. It was a gun.
- Q. Um-hm. Thank you, Mr. Smith, nothing further.

When the prosecutor finished, no one in the courtroom had any doubt that the replacement had a gun.

Younger explains the Seventh Commandment: "A lawyer must never permit a witness to say something twice. The reason is simple. If the jurors hear something once, they may or may not believe it. If they hear it twice, they will probably believe it. If they hear it three times, they will certainly believe it. If it is in writing, nothing on earth will persuade them that it is not true." In cross-examination, as in other things, sometimes less is more. ■



"It was a gun."

IRVING YOUNGER'S TEN COMMANDMENTS OF CROSS-EXAMINATION

1. Be brief. ("Be brief, short and succinct.")
2. Use plain words. ("A trial lawyer should use short questions and plain words because the jury will understand them.")
3. Use only leading questions.
4. Be prepared. ("[Y]ou should never ask a question to which you don't already know the answer.")
5. Listen. ("[Y]ou must listen to the answer.")
6. Do not quarrel.
7. Avoid repetition. ("[N]ever allow the witness to repeat on cross-examination what he said on direct examination. A lawyer must never permit a witness to say something twice.")
8. Disallow witness explanation. ("A trial lawyer must never permit the witness to explain anything on cross-examination.")
9. Limit questioning. ("[A]void asking the one question too many.")
10. Save for summation. ("[S]ave the ultimate point for summation.")



"Don't repeat the direct examination."

Irving Younger, *The Art of Cross-Examination* (ABA Section of Litigation Monograph, 1976).

THE ART OF CROSS-EXAMINATION

Cross-examination "requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination. One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence. It is a mental duel between counsel and witness."

From Francis L. Wellman, *The Art of Cross-Examination* (4th ed., rev. and enl. 1992) (original pub., 1903), at page 8.



THAT REMINDS ME OF A "WAR STORY"

We all know that our own legal war stories are perfect gems: instructive, humorous, justice triumphs, no gratuitous nudity and violence. So why won't our colleagues listen?

They say they've heard our stories before. Or they get that glazed look and ask which client can be billed for this "conference." Or worse, they subject us to their own long-winded, pointless, self-aggrandizing war stories as the price of listening to our gems. Have they no self-awareness? Philistines!

Is there no outlet for our wisdom? Now there is: *Lawnotes*. We want to be war story central. Send us your best war stories for possible publication (at the whim and caprice of the editors). Your stories should be instructive and succinct. They can be humorous or serious. They can change the names to protect the innocent and the guilty, or not. They can be practical to the nth degree or the stuff that myths are made of. They can be impeccably true or filtered through your self-interested prism. They are WAR STORIES!

Contact us to discuss format, length, content and the bounds of good taste. In the tradition of Aesop, tell your story. Get your name in print. Call *Lawnotes* editors Stuart M. Israel or John G. Adam at (248) 559-2110 or write or e-mail us: Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza Building, 17117 West Nine Mile Road, Southfield, Michigan 48075 or israel@martensice.com.

REASONABLE ACCOMMODATION GUIDELINES

Adele Rapport
Regional Attorney, EEOC'

I. Introduction

On March 1, 1999, the EEOC published its *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* ("Guidance")². As with our past guidances, it is in an easy to use, question and answer format and contains many case citations. The 67 page Guidance covers many subjects, including requests for and appropriate types of accommodation and undue hardship issues such as the interplay with collective bargaining agreements. The following discussion highlights key points of the Guidance and provides case citations and analyses not discussed in the Guidance.

II. Guidance Highlights

A. The Duty to Accommodate

1. Requests for Accommodation

Generally it is the employee's responsibility to request an accommodation. *Guidance* at 9-10. Additionally, the employee must cooperate in the interactive process. Courts have granted summary judgement for employers based on an employee's failure to do so. *Steffes v Stephen Co.*, 144 F. 3d 1070 (7th Cir. 1998); *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F. 3d 1130 (7th Cir. 1996). It should be noted that it is not necessary for the employee to provide notice of the need for accommodation himself. Rather notice by a third party such as a spouse or child is sufficient. *Guidance* at 10.³

Employers may have a duty to inquire about the need for an accommodation under certain circumstances. Such a duty arises when the employer knows the employee has a disability, knows the disability is causing performance problems and knows that the disability prevents the employee from requesting the accommodation. *Guidance* at 51; *Cassidy v Detroit Edison* 138 F. 3d 629 (6th Cir. 1998); *Bultemeyer v Fort Wayne Community Schools*, 100 F. 3d 1281 (7th Cir. 1996). Employers are entitled to make inquiries and request reasonable documentation about accommodation unless the disability and the need for an accommodation are obvious. *Guidance* at 12-13. The employer is also entitled to request periodic updates at reasonable intervals. *Guidance* at 57.

2. Types of Accommodation

Initially, an employer can select among effective accommodations. However, to be effective an accommodation must provide the employee with an equal opportunity to achieve the same level of productivity (and rating level) as other employees. In other words, an employer cannot select an accommodation that will only allow an employee to achieve an average performance level where another accommodation would allow the employee an opportunity to achieve an outstanding level of performance. *Guidance* at 18.

a. Leave as Accommodation

Perhaps the most common type of accommodation requested (and litigated) is medical leave. Courts have generally found liability where the employee requested a reasonable, fixed period of time. *Haschmann v. Time Warner*, 151 F. 3d 591 (7th Cir. 1998)

(2-4 week leave reasonable); *Criado v. IBM Corp.*, 145 F. 3d 437 (1st Cir. 1998) (1 month leave reasonable); *Nascom v U.S. West Communications*, 143 F. 3d 1324 (10th Cir. 1998) (leave within time allowed for short term disability reasonable). However, longer periods of time and sporadic and unpredictable absences have been held unreasonable. *Waggoner v Olin Corp.*, 169 F. 3d 481 (7th Cir. 1999) (sporadic and unpredictable absences not reasonable); *Gantt v. Wilson Sporting Goods Co.*, 143 F. 3d 1042 (6th Cir. 1998) (one year not reasonable).

In the Guidance, the Commission indicates that a request for indefinite leave may be reasonable unless the employer can establish that such leave would be an undue hardship under the given circumstances. *Guidance* at 57. In determining that an indefinite leave request is not *per se* unreasonable the Commission recognized that doctors may not be able to predict a return to work date and the employer can require periodic updates during the leave granted. *Id.*

Employees cannot be punished for taking leave. Employers should make certain that they do not retaliate against an employee who took a disability-related leave by giving them a poor performance rating. For example, if a job has certain annual productivity requirements and the employee who took a three month medical leave doesn't achieve them, the employer should consider the *pro rata* achievement during the time worked and evaluate the employee's performance on that basis. *Guidance* at 28-29.

Employees must be returned to the same job unless it would be an undue hardship to hold that position open during the leave. If so, the employee must be assigned to an equivalent vacant position upon return. *Guidance* at 27-28. Employers should also be careful to narrowly tailor return to work inquiries to questions that are job related and consistent with business necessity (i.e., limited to fitness to return to duty in light of the condition that resulted in the leave).

Finally it should be noted that an employer can require that the employee remain at work with an accommodation in lieu of a leave, unless the leave is necessary to obtain medical treatment. *Guidance* at 29. Of course an employee has a right to take Family and Medical Leave Act time even if there is an accommodation that would allow the individual to remain at work.

b. Reassignment as an Accommodation

Reassignment is an accommodation specifically described in the Act. 42 U.S.C § 12111(9)(B). The Commission makes clear that reassignment is the accommodation of last resort, only used if employees cannot be accommodated in their own positions. *Guidance* at 39. In such circumstances employee must be assigned to vacant open positions for which they are minimally qualified even if they are not the best qualified. *Guidance* at 38. In other words, an employee cannot be required to compete for an open position, as such an opportunity would exist regardless of the statutory right to an accommodation. *Guidance* at 44; *AKA v. Washington Hosp. Ctr.*, 156 F. 3d 1284 (D.C. Cir. 1998).

Employers are not required to provide the employee with training so that he will be qualified for the vacant position. *Guidance* at 39. However, employers should make certain that they provide training that is available to all selectees for vacant positions, as we will investigate the potential pretext of any assertion that there were no open positions for which the disabled employee was qualified.

Probationary employees, like permanent employees, are entitled to reassignment as an accommodation. *Guidance* at 40. This is required only where the probationary employees were at one time able to perform the position for which they were hired. *Id.* Otherwise the claim is analyzed as a hiring case and reassignment is not a required accommodation for applicants.

The duty of reassignment has a broad scope. The potential available open positions cannot be limited to the department or facility where the disabled employee was employed prior to the need for an accommodation. *Guidance* at 42; *United States v. Denver*, 943 F. Supp. 1304 (D. Colo. 1996). As to the timing of the vacancy, the *Guidance* indicates that employers are required to notify employees of positions that are open or may become open within a reasonable period of time (six months). *Guidance* at 39, 43.

c. Changing Supervisors as an Accommodation

The *Guidance* states that changing supervisors is not a required accommodation. *Guidance* at 46. However, the supervisor may be required to change supervisory methods. Courts have held that creating a "stress free" environment, an accommodation frequently sought with a change in supervisory methods, is not an appropriate accommodation, e.g., *Gaul v. Lucent Tech. Inc.*, 134 F.3d 576 (3rd Cir. 1998).

d. Modifications of Policies as an Accommodation

Employers may be required to modify certain policies in order to accommodate a disabled individual. However, the modifications need only be prospective. *Guidance* at 48. For example, an employee who had a significant tardiness problem due to a disability related condition would not be excused for prior offenses. The employer would simply have to modify the employee's start time in the future. Similarly, an employer is not required to withhold discipline for inappropriate conduct even if the misconduct was disability related. *Guidance* at 47; *Siefkin v Arlington Heights*, 65 F.3d 664 (7th Cir. 1995).

e. Accommodation of Individuals with a Record of or a Perceived Disability

The *Guidance* does not deal with the issue of whether individuals who have a record of or who have perceived disabilities have a right to accommodation. This author believes that they do. The statutory right to accommodation is not limited to individuals with actual disabilities. 42 U.S.C. § 12112(b)(5)(A). Rather, it generally refers to accommodations of qualified individuals with disabilities, which is defined as including all three categories. 42 U.S.C. § 12102(2); § 12111(8). Certain individuals with records of or perceived disabilities will not need an accommodation, such as those who have no limitations in major life activities but are mistakenly regarded as having same. Yet, others in those categories do need accommodation. *Deane v Pocono*, 142 F.3d 138 (3d Cir. 1998). For example, an individual who had a debilitating cancer that was "cured" through chemotherapy and radiation, may need time off in the future for follow up medical check ups and treatments. Similarly, individuals with multiple sclerosis who may not yet be substantially limited in a major life activity may need time off during flare ups of their condition or a scooter to get around at work in order to avoid premature actual disability. Clearly Congress did not intend to force individuals to actually disable themselves by forgoing medical treatment or working without a reasonable assistive device in order to gain the right to these necessary accommodations.

B. The Undue Hardship Defense

In addition to discussing accommodation issues, the *Guidance* also touches upon the undue hardship defense. It should be noted that this is an affirmative defense that must be proven by the employer. See 42 U.S.C. § 12112(b)(5)(A). Merely asserting that the cost of the accommodation exceeds the benefit is insufficient to establish the defense. *Guidance* at 58. Rather, the employer must demonstrate that it cannot afford the accommodation based on a broad view of its financial resources or that the accommodation would cause significant difficulty in its operations. 42 U.S.C. § 12111(10); 29 C.F.R. Sec. 1630.15(d).

Some employers have asserted that an accommodation that violates a collective bargaining agreement constitutes a *per se* undue hardship. The Commission rejects this notion, stating that the provisions of a collective bargaining agreement are factors to be considered, but each case must be examined individually and the employer should attempt to negotiate a good faith variance in the collective bargaining agreement. *Guidance* at 59-60. But see *Eckles v. Consol.*, 94 F.3d 1041 (7th Cir. 1996).

III. Conclusion

The Reasonable Accommodation *Guidance* covers many commonly litigated accommodation issues. It provides examples and analysis as well as case law supporting and contradicting its position on these issues. It also analyzes the undue hardship defense and provides guidance in handling the issues that arise in that context as well. Practitioners would be well advised to become familiar with the *Guidance*. While all may not agree with our position, the *Guidance* does reveal the Commission's view on critical issues and it will be followed in our investigations and litigation.

— END NOTES —

¹Adele Rapport is the Regional Attorney for the Detroit District Office of the EEOC. The views stated in this article are her own and do not constitute EEOC policy or guidance.

²The *Guidance* can be found at our website, www.eeoc.gov, or may be obtained by calling (202) 663-4900 or 1-800-669-EEOC.

³It should be noted that the employer may not provide notice to a third party that the employee is being accommodated, e.g., it cannot so advise a co-worker inquiring about what he or she believes is special treatment. *Guidance* at 52.

⁴Other commonly requested accommodations include modifications to schedules and work at home requests. The Commission believes both are appropriate if they do not pose an undue hardship. *Guidance* at 32, 47; *Ralph v. Lucent Tech.*, 135 F.3d 166 (1st Cir. 1998) (modified schedule); *Carr v. Reno*, 23 F.3d 525 (D. DC 1995). ■



LAWNOTES FOR CIVILIANS

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THEY'RE SINGING "ANOTHER ONE BITES THE DUST" AT THE WESTERN DISTRICT, AS SUMMARY JUDGMENT FOR DEFENDANTS PERVADES THE COURT

John T. Below and Steven A. Tooman
Kotz, Sangster, Wysocki And Berg, P.C.

Pro Se Plaintiff Suffers Summary Judgment In Claim Against The United States Postal Service Because She Lacked Evidence She Was "Similarly Situated" To Comparators In Title VII Gender Discrimination Claim.

Jordan v. William J. Henderson, Post Master General, Et. Al., Case No. 1:98-CV-309 (July 12, 1999)(Judge Wendell J. Miles). *Pro se* black female plaintiff claimed Title VII gender discrimination against the United States Postal Service and certain employees. The plaintiff held only a transitional position and was terminated two months short of the transitional one year term because of restructuring. Other transitional employees, including two white males and one white female, were not terminated as a result of the restructuring. The plaintiff attempted to use these persons as comparators. The court stated that these employees were not similarly situated. "In order to be deemed 'similarly situated,' the individuals with whom the plaintiff seeks to compare her treatment must have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." (citing *Mitchell v. Toledo Hosp.*, 964 F2d 577, 583 (6th Cir. 1992)). Summary judgment was granted for defendants.

United Technologies Is Granted Summary Judgment On Gender Discrimination Claims.

Marlena Ritchie v. United Technologies Automotive Inc., et. al., Case No. 1:98-CV-131(May 17, 1999)(Judge Wendell A. Miles). Judge Miles granted the defendant, United Technologies Automotive Inc. (and predecessor names) summary judgment under Fed.R. Civ P. 56 with respect to the plaintiff's removed claims of gender discrimination under the Fair Labor Standards Act and Michigan's Elliott-Larsen Civil Rights Act. The general thrust of the plaintiff's claims was that she was not paid overtime while two males, who were allegedly "similarly situated" and had the same employee grade, were paid overtime. The court, employing the generally strict "similarly situated" test (*Mitchell v. Toledo Hosp.*, 964 F2d 577 (Cir. 1992)), found that the male employee comparators were not similarly situated, despite the fact that they had the same employee grade. Plaintiff also suffered summary judgment due to the fact that she had extensive deposition admissions regarding the independent judgment and discretion that she employed on a regular basis in her purchasing manager position. Plaintiff also failed to fill out the appropriate time slip requests for overtime. Accordingly, the court found that plaintiff failed under Elliott Larsen for the reason that she presented no "similarly situated" person for a disparate theory of recovery and, further, the Plaintiff's Fair Labor Standards Act claims was

dismissed on summary judgment for the reason that she was an "exempt" administrative employee whose work was directly related to management policies and involved the exercise of discretion and independent judgment on a regular basis. (citing 29 CFR §541.2 (e)(2) and (a)).

Western District Determines That Plaintiff With Epilepsy Who Takes Medication Is Not Disabled Or Substantially Limited In A Major Life Activity.

Rutlin v. Prime Succession, Inc., Et. Al., Case No. 5:98-CV-117(June 9, 1999)(Judge David W. McKeague). Plaintiff, a licensed funeral director, sued defendant for constructive discharge under the Americans With Disabilities Act. Plaintiff was diagnosed as having epilepsy. When plaintiff had a seizure, it was admitted that he was limited in all major life activities. However, when plaintiff took his medicine, the epilepsy was controlled and he enjoyed essentially all major life activities. (Citing *Gilda v. Mecosta County 124 F3rd 760 (6th Cir. 1997)* (and consistent with the United States Supreme Court case of *Sutton v. United Airlines*), the court stated that the impact of mitigating or corrective measures must be considered when determining whether or not someone is disabled or substantially limited in a major life activity. Here, the court held that the epilepsy was controlled by medicine and, thus, plaintiff was not protected under the ADA. The court also dismissed plaintiff's accommodation claim as the principal requested accommodation was more a matter of "preference" as opposed to an accommodation based on an actual medical restriction. "[A]n employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." (quoting *Hankins v. The Gap, Inc.*, 84 F3rd 797, 800 (6th Cir 1996)). See also *Gile v. United Airlines, Inc.*, 95 F3rd 492, 499 (7th Cir 1996) (employer is not required to provide the accommodation the employee requests or prefers, but only some reasonable accommodation).

Permanent Inability To Lift Or Work Over Shoulder Level Did Not Constitute A "Disability" Under The ADA.

Barber v. Pepsi-Cola Personnel, Inc., Case No. 1:98-CV-443 (July 8, 1999) (Judge Wendell A. Miles). Plaintiff brought suit alleging that his employer violated his rights under the American with Disabilities Act by removing him from a "transitional duty" program. Plaintiff's job involved substantial lifting as he sold and delivered products to stores. After having surgery on his shoulder for a torn rotator cuff, plaintiff returned to work under his employer's "transitional duty" program and was assigned a job that did not involve lifting. plaintiff was removed from the program when it became clear that plaintiff's medical restrictions were permanent. The Court determined that while the evidence indicated that plaintiff's physical condition affected his ability to perform activities which required overhead lifting, plaintiff's evidence failed to show that his performance of any "major life activity" was "substantially limited" by his physical condition.

Failure To Pursue Collective Bargaining Agreement Remedies Barred Claims For Wrongful Discharge And Breach Of The Duty Of Fair Representation But Not Constitutional And Statutory Claims.

Kutz v. Lansing Community College, Case No. 1:97-CV-922 (April 28, 1999) (Judge Robert Holmes Bell). Plaintiff brought suit against former employer and union for civil conspiracy, wrongful

discharge/breach of the duty of fair representation, violation of the Whistleblowers Protection Act, violation of First Amendment free speech rights, and violation of the Fair Labor Standards Act. The Court found that Plaintiff's failure to pursue his remedies under the grievance procedure in the collective bargaining agreement barred his wrongful discharge/breach of the duty of fair representation claim. However, since plaintiff's claims for violation of his First Amendment rights, violation of the Whistleblower's Protection Act, and violation of the Fair Labor Standards Act did not allege violations of rights created under the collective bargaining agreement, the Court found that summary judgment based on plaintiff's failure to exhaust his remedies under the agreement was not proper. With respect to the civil conspiracy claim, the Court granted summary judgment for the union and employer.

Summary Judgment On Claims For Retaliation And Wrongful Discharge In Violation Of The FMLA Warranted Where Employer Preparations To Open A New Plant Provided Legitimate Nondiscriminatory Reason To Make Plaintiff Sweep Floors And Plaintiff's Unexcused Absences Provided Nondiscriminatory Reason For Discharge.

Summerville v. Esco Company Limited Partnership, Case No. 1:98-CV-412 (May 12, 1999) (Judge Gordon J. Quist). Plaintiff alleged that his former employer wrongfully retaliated and discharged him for taking an absence authorized by the FMLA. Plaintiff missed approximately two weeks of work in February and March 1996 due to a foot injury. After returning to work, Plaintiff claimed that he was demoted from centrifuging chemicals to sweeping the floor. Plaintiff was terminated in January 1997. The Court found the employer had a legitimate, nondiscriminatory reason for removing plaintiff from his centrifuge position as three of the four centrifuge operators were moved as a result of preparations to open a new plant. The Court also found the employer had a legitimate, nondiscriminatory reason for the termination because plaintiff had a long history of unexcused absences excluding the absence in February and March 1996 that were covered by FMLA.

Co-Worker's Statement That He Believed In Slavery And That Minorities Did Not Deserve Hiring Or Promotion Was Not Sufficient For Race Discrimination Claim; Sex Discrimination Claim Based On Verbal Slurs And Attacks By Prisoners And Co-Workers Failed Because Plaintiff Failed To Show That Supervisors Acted Indifferently Or Unreasonably.

Ivy v. Michigan Department of Corrections et al., Case No. 5:98-CV-40 (June 22, 1999) (Judge Douglas W. Hillman). Plaintiff, a former employee of the Michigan Department of Corrections, brought an action for race and gender discrimination against two of her supervisors alleging they tolerated a continuing pattern of verbal slurs and attacks by prisoners and a co-worker. The Court found that a co-worker's statements that he believed in slavery and that minorities did not deserve promotion or hiring were not sufficiently pervasive or extreme to support the race discrimination claim. The Court found that the sexual harassment allegations concerning statements made by prisoners and a co-worker were more substantial and frequent. Nonetheless, the Court found that the sexual harassment claims failed, because plaintiff failed to show that the supervisors had notice of the harassment and acted indifferently or unreasonably. ■



DOCUMENTS FROM HELL: SEND *LAWNOTES* THE WORST!

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VIEW FROM THE CHAIR

Janet C. Cooper, Chair
Labor and Employment Law Section,
State Bar of Michigan

Current disputes and views . . .

Is affirmative action preference? If it is, for whom? And why? And is it thus unlawful? Just a bit of history might be helpful. The now pejorative term "affirmative action" has a long history in statutes...it has, in that context, meant to take positive action. As used in the Civil Rights Act of 1964, and in the Michigan Civil Rights Act, it meant, essentially, to take action which was remedial for a wrong. And indeed, that remains its meaning within those statutes. But there is another thread in this piece of cloth. That thread arose from the federal and state government directives now knit together in the Office of Federal Contract Compliance Programs. That strand set forth the proposition that government should not do business with those who did not observe its laws and policies.

But what then of those businesses who could not demonstrate their compliance with a showing of "reasonable representation" of racial and ethnic minorities? In the case context of Title VII, courts came to presume that a lack of reasonable representation, especially if it amounted statistically to two or more standard deviations, constituted a presumption of unlawful discrimination. The government chose to provide another avenue of opportunity: if the would-be contractor would file an "affirmative" plan, setting forth appropriate objectives, then the contract could be given! Such a plan required review, approval and would be monitored.

In the employment arena, Title VII was intended to provide redress for victims of unlawful discrimination, and in appropriate cases, to make certain that unlawful practices which had excluded protected class members, were eliminated or modified. The contracting programs were less a litigation measure, and more a "carrot and stick" approach to the same objective + equal opportunity.

And equal opportunity was what these laws and programs were about. So the measurement was based on the percentage of people in an appropriate geographic area who had the skills to do the job. If the representation in an employer's work force was "reasonable" no remedial action was necessary. If the representation was not reasonable, the plan was to lay out a course of action, with goals and a timetable, to move to reasonable representation. Employers were not asked to lower their standards, or to employ anyone who didn't meet the standards.

In the 1970's, the representation of racial and ethnic minorities in the employ of businesses increased significantly...black men rose from 2% to 10%. At that point, representation leveled out, and has remained at about 10% since then. There was not a fixed point of achievement, but rather a range of "reasonableness." There were additional benefits to achieving a representative work force, which most employers can relate.

The movement to provide opportunity, to open doors to equal opportunity despite our ugly history of racial and ethnic discrimination has paid enormous dividends. Some sociologists and economists credit these programs with the creation of a genuine African-American middle class.

Certainly every professional discipline has witnessed a significant increase; there are more lawyers, accountants, professors, doctors, and engineers who are people of color. We knew, a long time ago, that people tended to be trustful of people like themselves, and distrustful of those who appeared to be different. When asked, for example, if a white person had acquaintances of a different race and wanted such acquaintances, most would say "no, except for Joe." Who was Joe? "A guy I work with, he's okay" was the response.

If people could get acquainted in the workplace, they just might discover that they had more in common than in difference, a major first step in enlarging our viewpoints and putting individuals in the enviable position of making thoughtful choices. Today, many more people work together, and even socialize to some extent, than ever before. Much of this social improvement is the result of the partial elimination of unlawful discrimination in the workplace.

Businesses demonstrated substantial leadership in adopting and implementing voluntary affirmative action programs. Without their commitment, the extension of employment to racial and ethnic minorities and women, could not have reached present levels. Business has other valid considerations as well. If business is to succeed in a global economy, it must have and demonstrate knowledge and value for the various cultures with which it wants to do business. That essential fact has led many corporations to diver-

sify work forces, not just those who are in contact with other cultures, but throughout the business operation. Dividends clearly come from having persons who know different cultures, speak different languages, and have technical knowledge in your own workforce.

This application of law, however, is not fixed in concrete. We don't have two hundred years experience with it. It does, and will, require vigilance and regular review. Most businesses do that themselves, now, and should. When an employment profile moves into the "unreasonable" zone, it is appropriate to analyze it and correct the cause.

Title VII of the Civil Rights Act of 1964 was widely discussed and debated, and there was a broad base of support for equal opportunity among the people of this nation. The OFCCP programs were not so widely disseminated or debated, and haven't had the benefit of that broad base. Nor have the programs in higher education, which were likewise not so clearly delineated and discussed.

It is particularly in the field of education that attention is now focused. Early litigation in education was directed to K-12 programs and clearly segregated education systems, whether *de facto* or *de jure*. Little attention was initially directed to higher education, except in state universities and colleges. Private institutions were largely ignored. Now, however, the notion that affirmative action is unlawful preference is being argued with respect to both governmental and private institutions.

There has been much discussion about whether a minority student who qualifies for admission and doesn't need financial assistance should be part of an affirmative action program. The goal ought to be a sufficient number of qualified racial and ethnic minority and women applicants. What's a sufficient number? A number within roughly the range of applicants, and the populations which are eligible to apply. If a sufficient number apply and are accepted in reasonably representative percentages, the actuality of equal opportunity is demonstrated. If not, the possibility of unlawful discrimination may be much more likely. But if there is a representative census of racial and ethnic minorities, no affirmative action is needed. And if only a certain amount is appropriate to reach the "reasonable" figure, only that percentage should be figured. If a higher percentage of, for example, Asian students achieve admission without any extra consideration, and don't need affirmative efforts, so much the better.

We all know the arguments...not all students are equally well prepared, some are better test takers, shouldn't we "prefer" the best students at the highest ranked colleges and universities, not getting into the "best" school doesn't deny one a good education at a lesser institution.

As a society we should assure that all students will be educated to the same standards, and to the highest limits of their abilities. If we did that, in K-12 education, many of the differences in preparation would evaporate. We don't do it, and I see little hope that we have any real plans to do it. Are race and ethnicity factors in where and how students get better educations? Very probably. And so the universities try to fill in some of the gaps, just as they do for students with certain problems, like reading deficiencies, etc.

Universities have for decades dealt with certain groups of applicants differently, more affirmatively, and particularly. The children of alumni often receive more consideration, as do athletes, some artists, musicians, etc. Universities have long recognized the needs for researchers, debaters, those preparing for work in professions which are under-populated, and have made provisions for admitting students in particular disciplines. For universities to consider the needs of rural communities for doctors in deciding admissions to medical schools does not seem unreasonable to me, but it obviously does to others.

Some people, both white and African-American, have urged the viewpoint that affirmative action in all instances represents unlawful preference. Many African-Americans understand the term "affirmative action" as a synonym for equal opportunity, and view the attacks on affirmative action as a desire to return to a world of preference, privilege, and discrimination against people of color.

Now many of these questions are in the courts. Whether that's the best place to make the decision is less than clear. As attorneys, I would hope that reason could prevail on both sides, in the interest of our common goals of equal opportunity and equality before the law.

NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr.
Regional Director, Region Seven
National Labor Relations Board

As I reported in a prior column, the Agency has made available to the public on its web site NLRB charge forms and more recently petition forms. The Agency decided in January 1999 to make permanent the providing of charge forms to the public on its web site and has now decided to do the same with petition forms. Regional offices will continue to maintain records regarding the number of charges and petitions filed or downloaded from the Internet.

You may have noticed that legislation was introduced in late April 1999, to amend the National Labor Relations Act to provide for inflation adjustments to the Board's jurisdictional standards. The current jurisdictional standards were developed in 1959 and have not been changed since that time. The legislation, HR 1620, would require the Board to adjust its jurisdictional standards for inflation beginning on October 1, 1999 and at least every 5 years thereafter. The inflation adjustment factor would be based on changes in the Department of Labor's consumer price index for all urban consumers.

The practice of submitting position statements either in lieu of or in addition to other evidence is well established in Region 7 and I am sure in every other regional office. The Agency has encountered a number of situations where a party has attempted to place conditions on our use of a position statement. To clarify the Agency's position in this regard, we have changed our docketing letter, wherein we solicit your evidence and position with respect to the allegations of the charge, by the addition of the following language:

Further, please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus any claim of confidentiality cannot be honored except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. In this regard, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for some period of years after a case closes. Further, we may be required by the Freedom of Information Act to disclose such records upon request, absent some applicable exemption such as those that protect confidential financial information or personal privacy interests. Accordingly, we will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the foregoing laws, regulations and policies.

I would also like to comment briefly on a subject that comes up frequently in NLRB discussions, that being the taking of board affidavits. As most of you know, the affidavit is the keystone of the unfair labor practice investigation. Charging parties are required to provide affidavit testimony, most often taken by a board agent, whereas charged parties may choose not to do so. If, as a charged party, you decide to allow the board agent to take affidavits from your witnesses, it is the board agent who shall conduct the inter-

view and ask the questions. You are, of course, entitled to be present when representatives of your client are being interviewed so long as you do not interfere with, hamper or impede the agent's investigation. In most instances this will allow you to ask follow up questions once the agent has completed his or her questioning and, of course, you will have the opportunity to review the affidavit before it is signed. Generally board agents type or hand write their affidavits, but I have no objection if the board agent dictates an affidavit which may also be typed up by one of your support employees. The decision as to how an affidavit will be taken is up to the board agent as he/she is charged with the duty of capturing the essence of the witness's testimony as reported by the witness. I would also note that generally board agents are not permitted to take "group affidavits." Group affidavits involve situations where more than one affiant is providing testimony at the same time and/or situations where while only one affiant is testifying other potential witnesses are present to hear the testimony. The preferred method is to interview each affiant separately. ■

MICHIGAN SUPREME COURT UPDATE

David A. Rhem
Varnum, Riddering, Schmidt & Howlett, LLP

Unions Subject to Employer Contribution Actions

The court ruled 5-2, in *Donajkowski v. Alpena Power Co.*, 1999 WL 446368 (Mich. June 30, 1999), that an employer being sued for sex discrimination based upon the terms of a collective bargaining agreement (CBA) may seek contribution from a union that was a party to the CBA. The court rejected the union's contention that the employer, as an intentional tortfeasor, could not seek contribution under Michigan law. Instead, the court held that a union may be "accountable for its role in any alleged discrimination in the workplace and is subject to a contribution action as a joint tortfeasor." Justice Young wrote the majority opinion. Justice Kelly, joined by Justice Cavanagh, dissented.

Court Addresses WDCA Coverage Issues

In two decisions dealing with the Workers' Disability Compensation Act (WDCA), the court found that a National Guard technician and a weekend ski patrol member were not "employees" under the WDCA. In *Oxley v. Department of Military Affairs*, 1999 WL 511105 (Mich. July 20, 1999), the court ruled 5-2 that a National Guard technician was not an "employee" under the WDCA because his injuries arose out of his civil technician position which constituted federal, not state, employment. The court also ruled 5-2, in *Hoste v. Shanty Creek Management Co.*, 459 Mich. 561 (1999), that a weekend ski patrol member was not an "employee" because he was not employed under a contract "of hire," which typically includes receipt of payment intended as wages. Although the plaintiff was granted privileges such as free skiing and meal discounts in return for his services, the court found that these privileges did not suffice as payment intended as wages.

AN ACTIVIST NLRB IN THE POST-GOULD ERA?

George M. Mesrey and Jack VanHoorelbeke
Clark Hill, PLC

The post-Gould NLRB continues to issue decisions at a record pace. The NLRB also appears to be willing to re-evaluate certain longstanding precedent. Practitioners should monitor the NLRB's recent decisions since the changes are ongoing. The following is an outline of the most significant cases decided by the NLRB between March and June 1999.

REFUSAL TO HIRE/SALTING

Little Rock Electrical Contractors, Inc., 327 NLRB No. 166. The NLRB concluded that, although the employer refused to hire two job applicants because of their support of the union, the employer established that its decision was based on legitimate nondiscriminatory reasons. *Merit Electric Company*, 328 NLRB No. 29. Employer violated Act by refusing to hire an applicant because of his union activities. *Custom Top Soil, Inc.*, 328 NLRB No. 66. Employer did not violate the Act by enforcing its rules regarding employment applications.

EMPLOYER INTERFERENCE

Long Island College Hospital, 327 NLRB No. 169. Employer violated the Act when a supervisor warned employees to proceed with caution if they sought union assistance. The employer violated the Act by threatening the union spokesperson with a lawsuit for statements made at a conference. *Country Manor Rehabilitation*, 328 NLRB No. 17. NLRB dismissed allegations that the employer violated the Act by encouraging and soliciting employees to sign a decertification petition, promising it would terminate a shop steward if the union was voted out, threatening employees with unspecified discipline, and discriminating against pro-union employees by failing to discipline an employee who supported the decertification petition. *Wallace International De Puerto Rico, Inc., et al.*, 328 NLRB No. 3. Employer violated the Act by threatening plant closure if the union was voted in. *Extruded Metals, Inc.*, 328 NLRB No. 23. Employer violated the Act by threatening employees with the loss of their jobs if they did not approve employer contract proposals. *The Burlington Times, Inc.*, 328 NLRB No. 96. Employer violated the Act by granting employees benefits to discourage them from union activity. *Shoremen Trucking Co.*, 328 NLRB No. 137. Employer violated the Act by interrogating employees about union activities.

DFR/BECK

Painters District Councils 8, 16 and 33 and Local 4, 327 NLRB No. 180. Union violated the Act by failing to give employees initial notice of Beck rights and information regarding the percentage breakdown between representational and non-representational expenditures. See also, *Yellow Freight Systems of Indiana*, 327 NLRB No. 175; *Paperworkers, International and Its Local 987*, 327 NLRB No. 177.

EMPLOYER DISCRIMINATION

Vulcan Waterproofing Co., 327 NLRB No. 170. Employer violated the Act by discharging employees because of their union activities. *Masterform Tool, Co., Cylinder Components, Inc., and Rrp Enterprises, Inc.*, 327 NLRB No. 185. Employer violated the Act

by laying off employees because of their union activities. *Cooper Health System*, 327 NLRB No. 189. Employer violated the Act by disciplining an employee because of her union activities.

SUPERVISORY STATUS

Pepsi-Cola Co., 327 NLRB No. 183. Employer's account representatives who have merchandisers assigned to them are statutory supervisors. *Crittendon Hospital*, 328 NLRB No. 120. Employer's registered nurses are not statutory supervisors. *Mississippi Power & Light*, 328 NLRB No. 146. In a split decision, NLRB overruled *Big Rivers Electric Corp.*, 266 NLRB 380, and held that employees who monitor the transmission and distribution of electric power, design switching sequences, and direct field employees in carrying out switching orders are not statutory supervisors.

ELECTION OBJECTIONS

Nor-Cal Ready Mix, Inc., d/b/a Antioch Rock and Ready Mix, 327 NLRB No. 187. NLRB overruled the employer's objections to an election on the basis that employee threats were not disseminated to the unit employees. *Eagle Transport Corp.*, 327 NLRB No. 198. The NLRB certified the results of an election where the union failed to receive a majority of the ballots cast. The NLRB concluded that the employer's posting of four letters from customers, stating that if the employees unionized, they may have to take their business elsewhere, was supported by objective facts, conveyed demonstratively probable consequences beyond the employer's control, and thus did not constitute objectionable threats. *VJNH, Inc., d/b/a Vestal Nursing Center*, 328 NLRB No. 16. Employer violated the Act and engaged in objectionable conduct by directing employees to refrain from discussing the union or engaging in other protected activities while at work. *Randell Warehouse of Arizona*, 328 NLRB No. 153. Union did not engage in objectionable conduct when it photographed employees while distributing union literature outside the employer's premises.

BAD FAITH BARGAINING

Carmody, Inc., 327 NLRB No. 204. Employer violated the Act by failing to bargain with the union and by failing to execute a successor collecting bargaining agreement.

BARGAINING UNITS

Pontiac Osteopathic Hospital, 327 NLRB No. 194. NLRB remanded to the Regional Director to determine the professional or non-professional status of medical technologists in a stipulated unit description. *Pratt & Whitney, a Division of United Technologies Corp.*, 327 NLRB No. 199. NLRB ruled an appropriate unit must include all similarly situated professional and technical employees located at the employer's facility, and not just the professional and technical employees in the engineering department. *Central Transport, Inc.*, 328 NLRB No. 60. NLRB found that the employer's history of bargaining on multi-employer basis rebutted the presumption in favor of single employer bargaining unit and dismissed the union's petition seeking single employer unit. See also *Novato Disposal Service, Inc.*, 328 NLRB No. 118. *AVI Food Systems, Inc.*, 328 NLRB No. 59. NLRB found that a single location unit of cafeteria workers was an appropriate unit for collective bargaining. *Robert Wood Johnson University Hospital*, 328 NLRB No. 131. NLRB concluded that employer's *per diem* nurses had been historically excluded from the bargaining unit and could not be added to the unit. *Deposit Telephone Co.*, 328 NLRB No. 151. Overturning 30 years of precedent favoring wall-to-wall

units in the utilities industry, the NLRB approved a unit at a small regional telephone company which excluded a number of other non-supervisory employees.

UNILATERAL CHANGES

Watsonville Newspaper, LLC, 327 NLRB No. 160. Employer violated the Act by unilaterally implementing a rule requiring display ad employees to remain out of the office for a certain period of time without prior notice *Eugene Iovine, Inc.*, 328 NLRB No. 39 (April 30, 1999). Employer violated the Act by unilaterally reducing its employees' hours of work. *Grinnell Fire Protection Systems Co.*, 328 NLRB No. 76 (May 28, 1999) Employer violated the Act by implementing its final contract offer without reaching impasse.

NONMANDATORY SUBJECTS OF BARGAINING

Bryant & Stratton Business Institute, 327 NLRB No. 174. Employer violated the Act by conditioning a merit wage increase on the union waiving its right to file ULP charge over discrimination in the amount the increase.

PROTECTED CONCERTED ACTIVITY

Linda Lewis and Roger Weekly, 327 NLRB No. 205. Employer violated the Act by discharging employee for engaging in protected concerted activity. *Niles Company*, 328 NLRB No. 58. Employer violated the Act by enforcing a policy preventing employees from discussing salary and payroll issues with other employees and discharging an employee because he violated the policy. *Dearborn Big Boy No. 3, Inc.*, 328 NLRB No. 92. Employer violated Act by discharging an employee for engaging in protected concerted activity.

RECOGNITION BAR ISSUES

Livent U.S., Inc., d/b/a The Ford Centre for the Performing Arts, 328 NLRB No. 1. NLRB held that the employer's voluntary recognition of the intervenor barred a subsequent petition.

TEMPORARY EMPLOYEES/ELIGIBILITY TO VOTE

New World Communications of Kansas City d/b/a WDAF Fox 4, 328 NLRB No. 10. NLRB found that a long term temporary employee was eligible to vote in a representation election.

HOT CARGO AGREEMENTS

Operating Engineers Local 520, 327 NLRB No. 208. NLRB found that a joint venture provision entered into with several employers violated the Act.

WITHDRAWAL OF RECOGNITION

Red Coat, Inc., 328 NLRB No. 28. Employer violated the Act by withdrawing recognition. *The Henry Bierce Company*, 328 NLRB No. 85. Employer violated the Act by withdrawing recognition from the union and by dealing directly with the employees concerning terms and conditions of employment.

SUCCESSORSHIP ISSUES

Global Industrial Services, Inc., 328 NLRB No. 34. NLRB dismissed allegations that a respondent was a successor employer and refused to hire former employees in order discourage union membership. *Tree/Free Fibrico*, 328 NLRB No. 51. NLRB found that an employer violated the Act by refusing to recognize the union as the employees' collective bargaining representative. *Daufuskie*

Island Club and Resort, 328 NLRB No. 56. NLRB found that the employer violated Act by denying employment to its predecessor's employees, unilaterally setting terms and conditions of employment, and refusing to bargain with the union.

UNION RESTRAINT AND COERCION

American Postal Workers, 328 NLRB No. 37. NLRB found that the union violated Act by interrogating an employee regarding her union membership and by willfully misinforming the employee about the status of her grievance.

INFORMATION REQUESTS

Illinois Heating and Air Conditioning, Inc. d/b/a Kranz Heating & Cooling, 328 NLRB 52. Employer violated the Act by refusing to provide relevant information requested by union regarding employer's relationship with another company. *Washington Beef, Inc.*, 328 NLRB No. 79. Employer violated the Act by refusing to provide the union with requested information. *Beverly Enterprises-Massachusetts, Inc., d/b/a Beverly Manor Nursing Home*, 328 NLRB No. 102. NLRB concluded that the employer violated the Act by failing to provide the union with relevant information. *Beverly Health and Rehabilitation Service, Inc.*, 328 NLRB No. 122. NLRB found that the employer violated Act by delaying in providing union relevant information.

REMEDIES/BARGAINING ORDERS

Bonham Heating & Air Conditioning, Inc., 328 NLRB No. 61. NLRB issued a *Gissel* bargaining order to remedy the employer's unfair labor practices. *T&T and Skypak, Inc.*, 328 NLRB No. 67. NLRB overruled *Driftwood*, 312 NLRB 247 (1993), and issued a remedial order providing that the "execution date" is the date that the agreement would have been executed but for the employer's unfair labor practice. *Eby-Brown*, 328 NLRB No. 75. NLRB refused to issue a *Gissel* bargaining order even though it concluded that the employer committed numerous unfair labor practices.

ELECTION PROCEDURES

Transportation Maintenance Services, L.L.C., 328 NLRB No. 93. NLRB approved an employee's request to withdraw a decertification petition filed after the election was held, but before the ballot were counted.

CONTRACT BAR

Direct Press Modern Litho, Inc., 328 NLRB No. 107. NLRB held that bankruptcy court's six and a half month extension of collective bargaining agreement acted as a contract bar to a petition.

SUPERVISORY TAINT/REPRESENTATION PETITION

Energy Systems & Service, 328 NLRB No. 125. NLRB found that the employer's crew leaders were supervisors and dismissed the representation petition because their involvement was extensive and pervasive.

ULP HEARINGS PROCEDURES

Westside Painting, Inc., 328 NLRB No. 110. NLRB held under §102.30 the NLRB's Rules and Regulations that witnesses in unfair labor practice hearings may not testify by telephone. ■

SIXTH CIRCUIT ADDRESSES NLRB POWERS, INDIVIDUAL LIABILITY, AND ARBITRATION

Gary S. Fealk
Vercruysse Metz & Murray, P.C.

From May 1999 through July 1999, the Sixth Circuit published approximately 20 cases dealing with a wide variety of labor and employment issues. The full text of published Sixth Circuit decisions is available on the Internet at: "http://www.law.emory.edu/6circuit" and "http://pacer.ca6.uscourts.gov."

NLRB ALJ CANNOT REVIEW PRIVILEGED DOCUMENTS

In *NLRB v. Detroit Newspapers*, Docket No. 98-1432 (July 22, 1999), the Sixth Circuit held that parties to an NLRB proceeding have a right, as a matter of law, to have an Article III judge review documents which they claim to be covered by the attorney-client privilege and work product doctrine. The court reversed a lower court ruling holding that an NLRB administrative law judge had the authority to review documents to determine if they are privileged.

COURT UPHOLDS DENIAL OF BOYS MARKET INJUNCTION

In *Allied Systems Ltd v. Teamsters Local 327*, Docket No. 98-5862 (June 9, 1999) the Sixth Circuit upheld the district court's refusal to grant a *Boys Market* injunction. The court held that the lower court did not abuse its discretion in determining that the union struck over a wage dispute which was not subject to the parties arbitration agreement and, consequently, that a no-strike obligation could not be implied.

PLAINTIFF MUST SHOW AGE BIAS IN REDUCTION OF FORCE CASE

Applying Michigan law, the court held that a plaintiff claiming age discrimination in a reduction-in-force case cannot survive summary judgment simply by showing that he was qualified for the position, that he was the only employee terminated, and that younger employees were retained. Rather, the court stated that a plaintiff must also establish that his age was a determining factor in the adverse employment action in order to survive summary judgment. *Byers v. Sea-Land Service, Inc.*, Docket No. 98-1721 (July 1, 1999).

ARBITRATOR'S AWARD VACATED FOR EXCEEDING AUTHORITY

Where a collective bargaining agreement read that an employee "who is absent for three (3) working days without notifying the Company of the reason for his absence . . . is considered a voluntary quit," the arbitrator exceeded his authority by reinstating an employee who failed to return from a medical leave and failed to notify the employer that he was still injured and could not report. The court held that the contractual language was clear and unambiguous and, thus, the arbitrator exceeded his authority by creating an exception for employees who fail to return from an expired medical leave. *IBEW Local 175 v. Thomas & Betts Corp.*, Docket No. 98-5617 (June 29, 1999).

FLSA DOES NOT REQUIRE MEAL CREDIT PLAN TO BE VOLUNTARY

In *Herman v. Collis Foods, Inc.*, Docket No. 97-6461 (May 24, 1999), the Sixth Circuit struck down a Department of Labor regulation that required employees to voluntarily accept a meal credit in lieu of payment in order for the cost of the meal to be counted as remuneration under the minimum wage provisions of the Fair Labor Standards Act. The court held that as long as the meal-credit plan was "customarily furnished" by the employer, the FLSA does not require that employees voluntarily accept the meal-credit plan.

SUPERVISORS CANNOT BE SUED UNDER THE REHABILITATION ACT

The court held that supervisors do not meet the definition of "employer" under the Rehabilitation Act of 1973. Relying on *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997), which held that there is no individual liability under Title VII, the court held that an aggrieved federal employee could not sue his supervisors for discrimination and retaliation. *Hiler v. Brown*, 177 F.3d 542 (6th Cir., 1999).

SIXTH CIRCUIT REFUSES TO SET ASIDE ELECTION BASED ON UNION MISREPRESENTATIONS

In *Maremount Corp. v. NLRB*, 177 F.3d 573 (6th Cir., 1999), the employer sought to set aside the results of an election based on union misrepresentations. In this case, the union, during an election campaign, misrepresented to employees that they were signing up for tee shirts when, in fact, they were signing a "vote yes" petition which was later distributed as a handbill. The court held that even if the union did make the alleged misrepresentations, the employees could have read the document they were signing. As a result, the court held that the union's method of obtaining signatures was not so deceptive as to rob employees of their free choice which would necessitate vacating the election results.

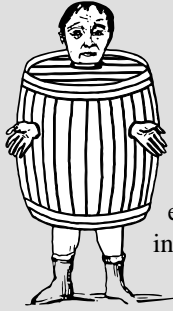
GENDER DISCRIMINATION – PRIMA FACIE CASE

In gender discrimination case, a female prison worker failed to state a *prima facie* case under the *McDonnell Douglas* burden-shifting test when she presented no evidence that she was meeting the employer's legitimate expectations by performing her job to her employer's satisfaction. The court held that a plaintiff can not meet this element of a *prima facie* case when her evidence consists of the opinions of individuals who were not in a position to evaluate all or most of her work. *Warfield v. Lebanon Correctional Institution*, Docket No. 98-3588 (July 1, 1999).

EMPLOYER REQUIRED TO ARBITRATE AFTER CONTRACT EXPIRATION

In *South Central Power Co. v. IBEW, Local 2359*, Docket No. 98-3817 (July 29, 1999), the Sixth Circuit held that an employer was bound to arbitrate a grievance which involved facts and occurrences which arose before expiration of its collective bargaining agreement with the union. Specifically, the court held that the employer was required to arbitrate even though the grieving employee was terminated during a gap between two labor agreements. In this case, the employer had learned that the employee violated a rule contained in the old labor agreement that required him to live within 20 miles of the facility and warned him that he would be terminated if he did not relocate. This warning was given while the old agreement was still in effect. Applying the United States Supreme Court case of *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991), the court held that the employee's termination arose out of the old agreement and therefore the right to arbitration survived expiration of the agreement. ■

THE JOY OF LABOR LAW



NLRB History: The First 60 Years.

Looking for the perfect gift? Looking for a sleep aid? By popular demand(?!), and apparently as part of the vice president's reinventing government campaign, the NLRB has just published its history, *The Story of the National Labor Relations Board: 1935-1995*. You can read it on the NLRB web site (www.nlr.gov) under "other publications." If you have stayed awake at night wondering who was the second NLRB chairman (Harry A. Miller), this book is your answer to insomnia. Now you can learn the names of all Board members and General Counsels along with other fascinating bits of NLRB history. Depending on the 2000 election returns, of course, the first sixty years of the NLRB may be its last.

Defamation-Proof. Jack Kevorkian (remember his starvation promise) was dealt another death blow, so to speak, when the Michigan Court of Appeals ruled he was defamation-proof, at least when it comes to being labeled a "killer." *Kevorkian v. AMA*, No. 203985 (8/6/99). Kerkorian filed his defamation lawsuit in 1995, before he "ended suffering" on 60 Minutes. He sued the AMA, the Michigan Medical Society and five doctors. Kevorkian's claim had about as much merit as the defamation claim in *Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974). Writing for the majority, Justice Marshall held that the union's use of Jack London's definition of a scab ("two-legged animal," "traitor," "Judas," etc.) was entitled "to the protection of the federal labor laws." Truth is a defense in a defamation case. The Michigan Court of Appeals could have paraphrased Justice Marshall: "Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true." 418 U.S. at 283. Just what the "doctor" ordered.

Too Young to Sue, But Too Old to Not Work. Another Court of Appeals decision is likely to cause a massive exodus of the X generation from Michigan: they are not protected from reverse age discrimination under the Civil Rights Act, MCL 37.2101 *et seq.* In *Zanni v. Medaphis Physician Services Corp.*, No. 206245 (8/10/99), the court reluctantly dismissed the 31 year old plaintiff's claim. She was told by a supervisor that her "voice sounded too young" and was replaced by an "older female." The court relied on an earlier decision that the state civil rights law protects workers from discrimination only if they are too old, not too young. Hey, isn't that age discrimination! To paraphrase Jethro Tull: "She was too young to sue, but too old to not work."

Banning "Gang Symbols." Some employers might be tempted to follow the "enlightened" Mississippi school board that imposed a ban against a Jewish student wearing the Star of David because school officials thought it was a "gang symbol." The school authorities wimped out and reversed the ban after the threat of an ACLU-supported lawsuit and widespread public criticism from diverse sources, including such liberals as Pat Robertson and the Christian Coalition. C'mon, it's time to get tough on gang crime! Employers won't wimp out like those Mississippi politicians. We need anti-gang rules in the workplace, warranted by "business necessity" and "exigent circumstances." For example, how about a ban on shoes, since they frequently are worn by gang members for activities like stomping, kicking butt, and keeping time to obscene rap songs. Or a ban on hats at work, since gang members wear hats as recognition signs and to cover their bald spots. Pants that are too loose should be outlawed since they can conceal weapons as well as expanding waist lines. This trend will lead to a new area of labor law, the subject of my forthcoming law review article: J. Adam, "Your Mother Dresses You Funny: The Interface Between the ADA, the Civil Rights Act and the Free Association Rights of Gang Members and Other Fashion Criminals in the Workplace," 12 *Journal Of Too Much Time On My Hands* 137-298 (2000).

Arbitrators Are Not "Philosopher-Kings." In denying a grievance, one arbitrator reminded the parties: "Arbitrators are after all not Philosopher-Kings," alluding to Plato's *Republic* or the applicable Cliff's Notes. *Norfolk Shipbuilding*, 81 LA 189, 191 (1983). We knew that. In case other arbitrators need a dose of humility, the Sixth Circuit points out that judicial deference goes only so far. In *IBEW v. Thomas & Betts*, 161 LRRM 2646, 1999 WL 430168 (6/29/99), the "panel was confronted with an arbitrator who did not 'have the wit to point to some language in the contract as supposedly supporting his decision.'" On the other hand, the Sixth Circuit also reminded district courts that arbitration awards should not be vacated based on vague notions of "public policy." *Mid Michigan Regional Center-Care v. Professional Employees Division of Local 79*, 161 LRRM 2853, 1999 WL 477019 (7/12/99). We guess federal judges "are after all not Philosopher-Kings" either, at least at the district court level. The moral for arbitrators: protect your awards from judicial interference with either (a) wit or (b) contract language.

John G. Adam

MERC UPDATE

Douglas V. Wilcox

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Since the previous issue of *Lawnnotes*, the Michigan Employment Relations Commission has issued seven decisions and orders in a variety of cases. A brief summary of those cases follows. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations website at www.cis.state.mi.us/ber.

REPRESENTATION

Airport Community Schools, MERC Case Nos. C98 C-52 and R98 B-25 (June 22, 1999). MERC affirmed ALJ's conclusion that on-call substitute bus drivers have a sufficient community of

interest with regular full-time bus drivers to remain part of the bargaining unit. MERC distinguished *Coldwater Community Schools*, 1998 MERC Lab Op 471 and *Chelsea School District*, 1994 MERC Lab Op 268. That is, the substitute bus drivers in this case have a reasonable expectation of becoming regular full-time employees, are entitled to hiring preferences into full-time positions, and are restricted from refusing more than 25% of their assignments without facing possible dismissal.

REFUSAL TO BARGAIN

City of Detroit, MERC Case No. C98 F-135 (June 24, 1999). ALJ held that employer was justified in its refusal to bargain with union of non-supervisory employees because it attempted to include a supervisor from a union of supervisory employees on its negotiating team as an observer. The ALJ recognized that the employer and union have the right to choose their representatives in bargaining and the party objecting must demonstrate exceptional circumstances such as bad faith or ulterior motive to sustain such objection. Citing *General Electric v NLRB*, 412 F2d 512; 71 LRRM 2418 (CA 2, 1969), *affirming*, 173 NLRB 253, 69 LRRM 1305 (1968), and *St. Clair Community College*, 1984 MERC Lab Op 879. However, the ALJ also noted that the policy of complete separation between supervisors and non-supervisors in collective bargaining has been consistently enforced by the Commission. *See, e.g., Northern Michigan University*, 1982 MERC Lab Op 196; *Michigan State Univ.*, 1984 MERC Lab Op 592; *Clio-Vienna Police Dept.*, 1994 MERC Lab Op 39. The union's attempt to include a supervisor on its team, even as a silent observer, was contrary to this firmly-established and statutorily-based policy, and would create the type of conflict of interest anticipated by the Second Circuit in *General Electric*. (No exceptions).

DISCRIMINATION

Detroit Board of Education, MERC Case Nos. C99 B-26 and C99 B-27 (June 24, 1999). ALJ dismissed employee's refusal to bargain charge against employer for allegedly failing to answer a grievance because the employee has no standing to assert such claims. The ALJ stated that MERC has consistently held that an individual may not file a charge which asserts that an employer has violated its duty to bargain in good faith. Citing, *Kent County Education Ass'n -and- Rockford Education Support Personnel Association*, 1994 MERC Lab Op 110 (dismissed as moot, Court of Appeals, Docket No. 173032, May 5, 1995). The duty to bargain under PERA runs between the employer and the exclusive bargaining representative, not between the employee and the employer. (No exceptions).

City of Detroit (Lake Huron Water Treatment Plant), MERC Case No. C98 E-90 (June 3, 1999). ALJ dismissed employee's claim that his discipline was based on the fact that he requested the employer to follow appropriate health and safety procedures. The employee failed to establish any link between his protected activities and his discipline. The ALJ noted that only if employer expressions of dismay over an employee's protected activity are accompanied by threats or direct action, are they sufficient to find union animus. Citing *City of Oak Park*, 1995 MERC Lab Op 576, 581 and *Standish-Sterling Comm Schools*, 1993 MERC Lab Op 251, 259. (No exceptions).

CONTRACT INTERPRETATION

City of Detroit (Labor Relations), MERC Case No. C98 F-123 (June 22, 1999). MERC affirmed ALJ's dismissal of union's charge that city violated the Act by requiring lieutenants to answer grievances filed by members of their own bargaining unit. The

INTERNET RESEARCH POTPOURRI

Scott G. Hornby

Esordi, Hornby & Sawicki, P.L.L.C.

Readers of my previous columns have probably gathered that I have a fetish for research and informational Websites. I do. Moreover, it is exciting to locate detailed information with the least amount of effort, and I recently used two Websites consistent with this theme; one is employment law specific and the other is a general search engine linking employment law websites:

A. *Employment Law Central.* This Website (<http://www.employmentlawcentral.com>) correctly boasts that it is "Organizing and disseminating the emerging employment law in a free content site." The Website does, in fact, provide free access to not only Michigan employment law sources, but also, to national sources. One of the most useful aspects of the Website (at least for me), in addition to Michigan Compiled Law and Administrative Code access, is the new employment law case update. This features a brief case synopsis of recent employment law decisions from the U.S. Supreme Court, the Federal Circuits, and the Michigan Courts. There is a free newsletter and there are links to other labor and employment law related Websites as well.

B. *Ask Jeeves.* Named after the quintessential butler, this is a plain-language search engine found at <http://www.askjeeves.com>. Users simply formulate a question, in plain-language of course, and *askjeeves* will direct the user to any relevant Web link(s). I typed the query, "What is the Americans with Disabilities Act of 1990?", and the search revealed numerous related links through other search engines, such as Yahoo, Infoseek and Altavista. The search query also listed Websites containing the full text of the law and information regarding mechanisms for companies to assure compliance with the law. This is a very user friendly and forgiving Website, especially when a person has no clue where to begin researching.

These Websites are proof positive that one need not be a computer or internet expert to successfully conduct efficient and cost-effective research.

Commission concluded that this case involved a bona fide dispute over the interpretation of contract language, i.e., the meaning of the term "commanding officer." MERC has consistently held that where such a dispute exists, it will not find a violation of PERA absent a showing of repudiation of the contract or the collective bargaining relationship. *Citing County of Oakland Sheriff's Dept*, 1983 MERC Lab Op 538, *Twp of Redford*, 1985 MERC Lab Op 1180, and *Taylor Bd of Ed*, 1983 MERC Lab Op 77.

DUTY OF FAIR REPRESENTATION

Pontiac School District, MERC Case Nos. C98 J-217 and CU98 J-53 (June 24, 1999). The ALJ dismissed employee's claim that the union breached the duty of fair representation regarding her request to file grievances. The evidence demonstrated that the union: (1) carefully investigated the employee's denial of a transfer request; (2) properly concluded her alleged harassment complaint against her boss was without merit; and (3) properly determined there was no valid basis to file a grievance regarding the docking of her pay under the circumstances. The ALJ also dismissed the employee's discrimination claim against the employer because there was no connection between her discipline and her union activity or other activity protected by the Act. (No exceptions). ■

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady Hathaway Brady & Bretz

Brief Touchings Create a Triable Hostile Environment Claim

Thomas v. Henderson, 44 F. Supp.2d 915 (E.D. Mich. 1999). Plaintiff sued her former employer under Title VII, claiming that her former supervisor sexually harassed her by making improper comments, touching her hand once and briefly touching her leg three times. Judge Rosen ruled that "standing alone, Plaintiff's allegations that [her supervisor] caressed her hand while playing cat-and-mouse with her time card and asked intrusive questions about her perfume, family and personal problems" could not sustain a hostile environment claim. Judge Rosen wrote that such "chicanery and commentary amount to, at most, nothing more than the horseplay and offensive utterances which, while distasteful, do not rise to the level of actionable sexual harassment." However, despite recognizing the offending supervisor's testimony that he may have touched the plaintiff's leg to get her attention when the plaintiff was purposefully avoiding eye contact during counseling sessions, Judge Rosen ruled that the "obvious potential sexual connotations" of such touching created a issue of fact for the jury.

Age-Based Election Law Survives Rational Basis Scrutiny

Breck v. Michigan, 47 F. Supp.2d 880 (E.D. Mich. 1999). A group of state judges challenged the constitutionality of Article VI, Section 19 of the Michigan Constitution, which prohibits individuals from being elected or appointed to a judicial office after reaching the age of 70. Noting that the election law permits judges to serve after age 70 if they are elected before reaching age 70, the judges claimed that the law creates an irrational classification basing electoral eligibility on the judge's age that violates the Fourteenth Amendment. After rejecting the State's many jurisdictional challenges, Judge Feikens ruled that rational basis scrutiny applied because the right to run for office is not a fundamental right and age is not an inherently suspect classification. Though recognizing

that the Michigan law did not perfectly reach these ends, Judge Feikens rejected the judges' claim because Michigan's election law is rationally related to the legitimate state objectives of preserving judicial competency and avoiding the disruption of mid-term mandatory retirements.

Four Separate, Isolated Discriminatory Acts is Not a Continuing Violation.

Hollowell v. Michigan Consolidated Gas Co., ___ F. Supp. ___ (1999 WL 382371). Over the course of three-and-a-half years, the African-American plaintiff filed four separate EEOC charges. The plaintiff filed suit more than three years after receiving "right to sue" letters concerning the first two charges, but within the statutory period concerning the latter two charges. Judge Gadola dismissed the Title VII and Elliott-Larsen claims stemming from the first two EEOC complaints because they were filed outside the applicable limitation periods. Judge Gadola reasoned that the continuing violations theory did not apply because each charge concerned a specific act that different supervisors directed toward the plaintiff, personally.

Judge Gadola dismissed the surviving retaliation and race discrimination claims for lack of evidence. In reaching this result, Judge Gadola ruled, *inter alia*, that it was unlikely that an African-American supervisor would discriminate against another African-American because of his race or retaliate against another African-American who filed a race discrimination charge with the EEOC.

International Union Cannot Enjoin Secession of Local Affiliate

Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union v. Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, ___ F. Supp. ___ (1999 WL 32561). The international union sued the local union pursuant to Section 301 of the LMRA to prevent the local union from seceding and joining a rival union. Judge Rosen dismissed the claim, ruling that preventing secession of a local affiliate does not constitute a "legitimate objective" of a labor organization under the Labor Management Reporting and Disclosure Act. Citing to several circuits that had reached the same result, Judge Rosen reasoned that public policy favors democratic control of unions and that international unions do not have "wholesale superintending authority over locals."

Negative Effect on Completion of Comerica Park Justified Injunction Precluding Strike

Pace Mechanical Services, Inc. v. Journeymen Plumbers Local No. 98, (Docket No. 99-72188, *dec'd* 5/14/99). The plaintiff, which had a contract to perform plumbing and pipefitting work for the new Comerica Park, sought a preliminary injunction prohibiting its unionized employees from refusing to install prefabricated units. The union claimed that use of prefabricated units violated the collective bargaining agreement and sought arbitration, but conceded that the collective bargaining agreement contained a no-strike clause. Following an evidentiary hearing, Judge Roberts granted injunctive relief and enjoined the threatened strike. Judge Roberts ruled that a strike would cause substantial harm by creating a negative ripple effect that would impact the entire project, would damage the plaintiff's reputation and would threaten the plaintiff's ability to obtain work in the future. Finally, Judge Roberts ruled that there was no other adequate remedy because an action for damages would simply aggravate the strife and delay the resolution of the dispute. ■

PROMPT REMEDIAL ACTION: DEFENSE OR ADMISSION OF LIABILITY?

Claudia D. Orr

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Can an employer impose discipline for a violation of its sexual harassment policy without admitting sexual harassment and creating liability under the Elliot-Larsen Civil Rights Act ("ELCRA")? For several reasons, the answer should be yes.

The "Code of Civility"

First, an employer can require a higher standard of conduct for its employees than required by civil rights laws. While employment policies may impose "a code of civility," civil rights laws do not. *Faragher v City of Boca Raton*, 118 S Ct 2275, 2283 (1998) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code."). Under ELCRA, a plaintiff must show conduct creating an *objectively* hostile environment that *substantially* interferes with the victim's employment. *Radtke v Everett*, 442 Mich 368, 394 (1993). While one incident (unless, for example, a rape) generally will not suffice under state law (*Id.* at 395), an employer can (and should) impose discipline for inappropriate conduct long before the creation of a hostile environment.

"Unwelcome" Conduct

Also, under ELCRA, the plaintiff must show that he/she was subject to "unwelcome" conduct *as defined by the Michigan Supreme Court*. *Radtke* held that "[t]he threshold for determining whether conduct is unwelcome is that the employee *did not solicit or incite it*." *Radtke*, 442 Mich at 384 (emphasis added). Courts have also recognized that, generally, the harassment must be unwelcome in the sense that the employee *deliberately* and *clearly* made her or his nonreceptiveness known to the alleged offender. *Jackson-Colley v Department of the Army Corps of Engineers*, 655 F Supp 122, 126 (ED Mich, 1987) (citing *Meritor Savings Bank, FSB v Vinson*, 477 US 57 (1986)). An employer may impose discipline because an employee's actions showed poor judgment, yet the "victim" may be unable to show the harasser's conduct was "unwelcome" as defined by controlling caselaw. Take, for example, *Highlander v KFC Nat'l Mgt Co*, 805 F2d 644 (CA 6, 1986), where the plaintiff asked her manager "out to have a business drink if you want to call it that" to discuss promotional possibilities. In response, the manager placed his arm around the employee and stated that if she was interested in becoming a co-manager, "there was a motel across the street." The Sixth Circuit held that the manager's sexual advance was not "unwelcome" because "the alleged harassment was induced by the plaintiff's suggestion that she and her manager meet in a bar to discuss her opportunities for promotion." *Id.* at 649.

After-Work Activity

Employers may also choose to take action where after-work conduct demonstrates poor judgment, even though the employer may not be liable for the after work activity under ELCRA. *See Jackson v Kimiel*, 992 F2d 1318, 1323 (CA 4, 1993) (employers are not required to investigate romances occurring outside of workplace to avoid liability); *Doe v Western Restaurants Corp.*, 674 So2d 561 (Ala Civ App, 1995), *cert denied* (1996) (where sexual harassment occurred during time off at a place outside of the control of the employer, claim dismissed, finding the law does not "sad-

dle" employers with liability for what employees do on their time off and concluding that what plaintiff suggested should have been done would be an invasion of privacy).

For example, in *Pepperman v General Motors Corp*, unpublished opinion of Michigan Court of Appeals, decided November 4, 1997 (Docket No 197097), the plaintiff consented to sexual relations with a coworker. After that relationship ended, the co-worker continued to harass her at work and at home. Plaintiff reported his activities to the defendant/employer and, after a warning, the harassment at work ended. The harassment away from work did not. Plaintiff's lawsuit for hostile environment was dismissed under *Radtke*. First, the court found that plaintiff failed to establish the requisite nexus between the harassment and work since "most of the alleged misconduct did not occur at work and could not have contributed to a hostile work environment." *Id.* at 3. Mere disruption to plaintiff's ability to concentrate at work as a result of events which had occurred outside of the workplace was insufficient to create a hostile environment for her *at work*. The *Pepperman* court held that the employer could not be liable for failing to eliminate problems that occurred outside of the workplace. *Respondent superior* liability requires a finding that the harasser's conduct *fell within the scope of his duties*. *Stacy v Shoney's, Inc.*, 1998 US App LEXIS 6659, *9 (CA 6, 1998); *Weatherholt v Meijer, Inc.*, 922 F Supp 1227, 1234 (ED Mich, 1996) ("Under Michigan law, an employer may be held liable for the intentional or negligent torts of its employees only if the tort is committed in the course of and within the scope of employment."); *McCalla v Ellis*, 129 Mich App 452, 460-61 (1983), *lv denied*, 422 Mich 853 (1985) ("An employer is liable only for the acts of its employee committed within the scope of employment.").

Conclusion

An employer's prompt remedial actions for violations of its policy is a defense and not an admission of liability under the Act. *Radtke*, 442 Mich at 396 (employer may avoid liability by taking prompt remedial action); *Downer*, 191 Mich App at 233 (same). To take any other position would only discourage employers from requiring civility in the workplace and disciplining inappropriate conduct. ■

MICHIGAN COURT OF APPEALS UPDATE

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Conflict between panels resolved in favor of arbitrability of civil rights claims.

In a much anticipated decision, which the Court stated broke "no new ground" and was consistent with strong state and federal pro-arbitration policy, a special panel of the Court of Appeals resolved a conflict over the arbitrability of civil rights claims in favor of arbitration. *Rembert v. Ryan's Family Steak Houses, Inc.* (April 9, 1999), 1999 WL 203148 (Saad, Kelly, O'Connell, Gage; Cavanagh, Hood, McDonald, dissenting). The Court joined the majority of courts and held that employers *may* contractually bind their employees to arbitrate statutory civil rights claims, provided (1) the contract is valid, (2) the procedure is fair, and (3) the employee does not waive any statutory rights or remedies.

Facts: When plaintiff was hired in 1993, he signed an arbitration agreement with Employment Dispute Services, Inc. While still employed, plaintiff sued defendants for race discrimination under the Elliott Larsen Civil Rights Act and for handicap discrimination under the Persons With Disabilities Civil Rights Act. He later resigned and amended his complaint to include constructive discharge and intentional infliction of emotional distress. The trial court granted summary disposition under MCR 2.116(C)(7) based on the arbitration agreement. Plaintiff appealed. Meanwhile, *Rushton v. Meijers*, 225 Mich. App. 156 (1997) decided that predispute agreements to arbitrate employment discrimination claims offended public policy and were unenforceable. Obligated to follow *Rushton*, a panel of the Court reversed the trial court. *Rembert v. Ryan's Family Steak House, Inc.*, 226 Mich. App. 821 (1997). A special panel was convened to resolve the conflict.

The Court underscored that arbitration has historically enjoyed "overwhelming" legislative and judicial support (the Michigan Arbitration Act was enacted in 1961). The Court cited cases in several substantive areas (medical malpractice, mental health providers, construction contract and child custody disputes) where binding arbitration was found to be a perfectly appropriate alternative to litigation, *provided the parties agree to it*. The Court found that the employment contract was no exception. *Renny v. Port Huron Hospital*, 427 Mich. 415 (1986); *Carlson v. Hutzel Corp. of Michigan*, 183 Mich. App. 508 (1990); *Dahlman v. Oakland University*, 172 Mich. App. 502 (1988).

Relying on the "Mitsubishi Trilogy" of cases, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20 (1991), and *Cole v. Burns Internat'l Security Services*, 105 F3d 1465 (DC Cir. 1997), the Court roundly rejected the argument that, notwithstanding courts' and legislatures' endorsement of arbitration as an "inexpensive and expeditious" alternative to litigation, *privatizing* the resolution of civil rights claims fell outside this mantra. Perfectly in step with the U.S. Supreme Court, the panel concluded that waiver of a judicial forum did *not* mean waiver of statutory rights.

The Court then discussed at length the perceived procedural shortcomings raised and addressed in *Gilmer*, finding them instructive on the issues of *fairness*.

Holding: The Court held that predispute agreements to arbitrate statutory employment discrimination claims are enforceable provided the following conditions are met:

- (1) **Valid Contract.** The agreement to arbitrate is *valid*, i.e., the employee does not waive any statutory rights or remedies and the arbitral process is fair.
- (2) **Arbitration is not expressly precluded by either ELCRA or PWDCRA.**
- (3) **Procedural Fairness.** The arbitration procedures must include: (a) clear notice; (b) right to counsel; (c) reasonable discovery (including depositions and subpoena power); (d) a fair hearing; and (e) a neutral arbitrator. (Significantly, fairness does *not* require the employer to pay the arbitrator's fee. However, given the cost shifting allowed under MCR 3.602, employers should consider providing this feature.)
- (4) If arbitral awards are challenged, the standard of judicial review is the "clear error of law" standard articulated in MCR 3.602 (J) and *Detroit Automobile Inter-Insurance Exchange v. Gavin*, 416 Mich. 407 (1982), i.e., a finding of "error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.* at 443.

- (5) To allow for sufficient review, arbitral awards must be in writing and contain findings of fact and conclusions of law.

Comment: By this holding, Michigan joins the majority of other state and federal courts upholding the *validity* of predispute arbitration agreements. It is important for counsel to note, however, that the Court of Appeals has declined to enforce arbitration clauses contained in an employee handbook which, by its terms, was not intended to bind the employer, following *Heurtebise v. Reliable Business Computers*, 452 Mich. 405 (1996). While plaintiff may win the battle over arbitration in such a case, she will lose the war, to the extent she bases a wrongful discharge claim on the employee handbook.

Failure to establish that employer treated a similarly situated employee differently held fatal to race and sex discrimination claims.

Wilcoxon v. Minnesota Mining & Mfg. Co. (April 23, 1999), 1999 WL 242381. Plaintiff sued her employer alleging race and sex discrimination in violation of the Elliott Larsen Civil Rights Act. The trial court dismissed portions of plaintiff's complaint relating to a job transfer because she failed to produce any objective evidence that the transfer was an adverse employment action, the second element of a *prima facie* case of intentional discrimination. The remainder of the action was later dismissed before trial, based primarily on plaintiff's inability to identify any similarly situated members of another class who were treated differently.

The Court engaged in a discussion of the alternate *evidentiary* methods used to establish a claim of intentional discrimination. On the one hand, a plaintiff may proceed under the "mixed motive" theory. The elements of a mixed motive case are: (1) membership in a protected class; (2) an adverse employment action; (3) a showing that defendant was predisposed to discriminate against members of plaintiff's protected class; and (4) the defendant actually acted on that predisposition. Alternatively, a plaintiff may establish a *prima facie* case by using the *McDonnell Douglas* burden-shifting approach.

Holding: Since plaintiff failed to produce evidence that would require, if believed, the conclusion that her race or sex were at least a motivating factor in her termination, summary disposition was proper under her mixed motive theory of proof. As plaintiff failed to establish, by admissible evidence, that defendants treated similarly situated white or male employees differently with respect to termination, summary disposition was proper under her pretextual theory of proof. Summary disposition in favor of defendants was affirmed.

Comment: This case is instructive in underscoring the importance for both defense and plaintiff's lawyers to carefully evaluate and define the appropriate class of "similarly situated employees" with which to compare plaintiff's treatment. Additionally, counsel should carefully examine whether the "adverse employment action" was "materially adverse." Under *Wilcoxon*, not every change in the conditions of employment will be deemed sufficiently "material" to withstand summary disposition. A plaintiff's *subjective* views are largely immaterial. In order for an employment action to be adverse for purposes of a discrimination action: (1) the action must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," *Crady v. Liberty Nat'l Bank & Trust Co.*, 31 F3d 132, 136 (CA 7, 1993); and, (2) there must be some objective basis for demonstrating that the change is adverse because "a plaintiff's 'subjective impressions as to the desirability of one position over another' [are] not controlling," *Kocsis v. Multi-Care Mgt., Inc.*, 97 F3d 876 (CA 6, 1996) (quoting *Kelleher v. Flawn*, 761 F2d 1079 (CA 5, 1985). ■



INSIDE *LAWNOTES*

- Dan Tukul addresses ADA disability issues, resolved and unresolved.
- Claudia Orr considers prompt employer action to remedy workplace sexual harassment.
- EEOC Regional Attorney Adele Rapport offers guidance on reasonable accommodation.
- Janet Cooper's *View From the Chair* looks at affirmative action.
- Stuart Israel tells a "war story" about (someone else) breaking one of the Ten Commandments of Cross-Examination.
- Information about upcoming events and LELS business: the 2000 LELS Mid-Winter dinner and education program on January 28 and 29 in Ypsilanti; The LELS-ICLE-FMCS 25th Annual Labor and Employment Law seminar on March 29 and 30 in Troy; *Lawnotes*' availability by subscription to non-Section members; *Lawnotes*' solicitation of your legal "war stories" and "documents from hell;" and more.
- Labor and employment law decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC; the Joy of Labor Law; websites to visit; and more.
- Authors John G. Adam, John T. Below, Janet C. Cooper, Gary S. Fealk, Scott G. Hornby, Stuart M. Israel, George M. Mesrey, Claudia D. Orr, Adele Rapport, David A. Rhem, William C. Schaub, Jr., Rosemary G. Schikora, Jeffrey A. Steele, Steven A. Tooman, Daniel B. Tukul, Douglas V. Wilcox, Jack VanHoorelbeke; and more.

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